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Tough News for Tuomey Healthcare System Re: Jury Found Violation of False Claims Act (FCA)

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Yesterday, a federal court jury in Columbia, South Carolina concluded that Sumter-based Tuomey Healthcare System violated the **False Claims Act** ("**FCA**") by submitting thousands of bills for services that resulted from tainted compensation arrangements under the federal Stark law. Tuomey submitted bills for approximately $39 million in services; it now faces potential liability not only for repayment of those amounts, but also treble damages and other penalties under the FCA in excess of $300 million.

The case goes back to 2003. Facing the risk that local specialty physicians would perform their outpatient surgeries at other locations, Tuomey entered into nineteen part-time employment contracts with those physicians requiring that they perform their outpatient procedures at Tuomey. The 10-year contracts provided for an annual base salary plus a productivity bonus, both of which varied based on Tuomey's net cash collections from outpatient procedures. Total compensation paid to the physicians, on average, was 19% higher than collections for their professional services.

Tuomey failed to reach agreement with one of the specialists, Dr. Drakeford, who then brought suit against Tuomey as a whistleblower under the FCA; the government took over prosecution of the action. The initial trial of this case resulted in a jury

verdict against Tuomey in March 2010. The jury found that Tuomey violated the Stark physician self-referral law (accepting the government's contention that the compensation took into account the volume or value of physician referrals) but not the FCA. The trial court set aside the jury verdict and ordered a new trial on the FCA claims, but then also held that Tuomey was liable to the government for nearly $45 million based on equitable claims that the payments by mistake of fact and unjust enrichment due to Stark violations.

The Fourth Circuit Court of Appeals reversed that judgment in March 2012 and ordered a new trial, which resulted in yesterday's verdict. The Fourth Circuit's opinion contained two wrinkles, in that the appeals court concluded that the facility/technical component that results from a physician's personally performed service constitutes a "referral" under Stark (such that the Tuomey physicians were making referrals); and that the jury must consider whether compensation does not meet fair market value requirements if it is computed by taking into account the volume or value of anticipated referrals.

Yesterday's verdict remains subject to post-trial motions including those relating to damages, and potentially a post-verdict settlement based on ability to pay. Any decision on a further appeal will likely await a resolution of those motions.